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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

Docket No. 77-1479

DONALD R. PLUNKETT,

Petitioner,

VS.

CITY OF LAKEWOOD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT.

RESPONDENT'S BRIEF IN OPPOSITION

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TOPICAL INDEX

	Page
Opinion	1
Jurisdiction	2
Questions Presented	2
Statement of Facts	4
1. Introduction	4
2. Prior to September 25, 1962	8
3. November 17 or 18, 1969	8
4. People vs. Plunkett, Case No. M 39760	11
5. Plunkett vs. Lakewood	12
6. Utility Right-of-Way	13
7. Building and Zoning Violations	15
8. Judgment of Trial Court	17
9. Other Litigation	17
Argument	19
1. The untimely filing of the petition deprives this court of jurisdiction over the case.	19
2. The decision is obviously correct and involves no conflict of opinion or other basis for review by this court.	21
3. Respondent's Observations and Photographs of Petitioner's Improved Real Property from Adjoining Public Streets and the Southern California Edison Property were not an Unreasonable Search Under the Fourth Amendment.	23
4. Respondent's Observations and Photographs taken from Helicopter Overflights of Petitioner's Real Property were not a Search.	26
5. Respondent's Inspection of Petitioner's Real Property was not an Unreasonable Search within the Meaning of the Fourth Amendment.	28
6. Respondent has not Deprived Petitioner of Property Without Due Process of Law, or Denied Petitioner the Equal Protection of the Laws.	29
7. Petitioner was not Deprived of Due Process of Law, or Denied the Equal Protection of the Laws by Exclusion of Evidence Under California Evidence Code §352.	31
Conclusion	33

TABLE OF AUTHORITIES CITED

Cases	Page
Air Pollution Variance Board vs. Western Alfalfa (1974) 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed. 607	25
Camara vs. Municipal Court (1967) 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727	24, 25
Dean vs. Superior Court [1973] 35 Cal.App.3d 112, 110 Cal.Rptr. 585	27
Dillon vs. Superior Court (1972) 7 Cal.3d 305, 102 Cal.Rptr. 161	25
Donald R. Plunkett vs. City of Lakewood Los Angeles County Superior Court Case No. So C 24763	4
Donald R. Plunkett vs City of Lakewood Los Angeles Superior Court Case No. SE C 8296	4
Donald R. Plunkett vs. John Sanford Todd, et al	19
Donovan vs. City of Santa Monica [1948] 88 Cal.App.2d 386, 199 P.2d 51	32
Fiske vs. Kansas 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108	22
Harris vs. United States [1968] 390 U.S. 228, 19 L.Ed.2d 1067, 88 S.Ct. 959	27
Katz vs. United States (1967) 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576	25
Pennekamp vs. Flordia 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295	7
People vs. Mullins (1975) 50 Cal.App.3d 61, 123 Cal.Rptr. 201	25
People vs. Municipal Court and John Landis	11
People vs. Plunkett Case No. M 39760	11
People vs. Plunkett Los Cerritos Judicial District Case No. M 39767	18
People vs. Plunkett Los Cerritos Municipal Court Case No. M 14281	8
People vs. Superior Court [1974] 35 Cal.App.3d 836, 112 Cal.Rptr. 764	27
Plunkett vs. Municipal Court and John C. Landis	10

TABLE OF AUTHORITIES CITED

Cases

	Page
Plunkett vs. Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California United States District Court, Central District, Case No. 72-1933-RJK	18
Portland R.L.P. Co. vs. Railroad Commission 229 U.S. 397, 33 S.Ct. 820, 57 L.Ed. 1248	22
See vs. City of Seattle (1967) 387 U.S. 541, 18 L.Ed.2d 943, 87 S.Ct. 1737	24, 25, 29
Snowden vs. Hughes (1944) 321 U.S. 1	32
Stone vs. Powell (1976) 428 U.S. 465, 49 L.Ed.2d 1067, 98 S.Ct. 3037	18
Time vs. Firestone (1976) 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154	23
Walter D. Teague III vs. Regional Commissioner of Customs [1969] 394 U.S. 977, 22 L.Ed.2d 756, 89 S.Ct. 1457	20
Whitney vs. California 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095	22

Codes

California Code of Civil Procedure §1822.50	9, 18
California Evidence Code §352	3, 31
California Rules of Ct. 24(a)	19
Civil Rights Act, 42 U.S.C. 1983	19
Evidence Code §776	8
28 U.S.C. §2101(c)	20
6 Witkin, California Procedure (2d), Appeal, p. 4462	19, 20

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The Respondent, City of Lakewood, California, a
municipal corporation, prays that the Petition for
Certiorari be denied.

OPINION BELOW

The opinion that the Petition for Writ of Certiorari
seeks to review (Petitioner's Appendix A) is unre-
ported, and has not been certified for publication.
As a nonpublished opinion, under California Rules of

Court 977, the same shall not be cited by a court or party in any other action or proceeding, except when the opinion is relevant under the doctrine of the law of the case, or *res judicata* or collateral estoppel are involved. The decision of the Second Appellate District of the California Court of Appeal, 2 Civ. 49610, was rendered following judgment in favor of the City of Lakewood in two separate Los Angeles County Superior Court cases, Donald R. Plunkett vs. City of Lakewood, Los Angeles County Superior Court Case No. SE C 8296, and Donald R. Plunkett vs. City of Lakewood, Los Angeles County Superior Court Case No. SO C 24763. The unanimous decision was filed November 15, 1977, and became final thirty days thereafter, or on December 15, 1977.

JURISDICTION

The court has jurisdiction to review said decision by Writ of Certiorari under 28 U.S.C. 1257(3) if the petition was timely filed. The judgment of the Court of Appeal of the State of California became final on December 15, 1977, and the Petition for Certiorari was filed April 18, 1978, more than ninety days thereafter.

QUESTIONS PRESENTED

The court is presented by the filing of the Petition for Certiorari on April 18, 1978, with the question of whether the same was timely filed. In addition, Petitioner in his application for a Writ of Certiorari

raises certain questions presented for review which are hereby restated to fit the facts of the case:

1. Whether Respondent's observations and photographs taken of Petitioner's improved real property from adjoining public street rights-of-way and Southern California Edison property, with the permission of the owner thereof, was an unreasonable search under the Fourth Amendment.

2. Whether Respondent's observations and photographs taken from helicopter overflights of Petitioner's real property was an unreasonable search under the Fourth Amendment.

3. Whether Respondent in inspecting Petitioner's real property made an unreasonable search within the meaning of the Fourth Amendment.

4. Whether Petitioner was deprived of property without due process of law, or denied the equal protection of the laws, by the City's enforcement of its zoning laws as to him.

5. Whether Petitioner was deprived of due process of law, and denied the equal protection of the laws, by the court determining in its discretion under *California Evidence Code* §352 to exclude evidence where its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice of confusing the issues, or misleading a jury.

STATEMENT OF FACTS

Petitioner's statement of the case is inaccurate, misleading, and contrary to the evidence and Findings of Fact of the trial court. The facts relevant to the questions presented by Petitioner in his Application for a Writ of Certiorari, and upon which both the trial judgment, the opinion of the Court of Appeal, and the decision of the California Supreme Court denying plaintiff's Petition for Hearing are based, are summarized as follows:

I. Introduction

The case of *Donald R. Plunkett vs. City of Lakewood*, Los Angeles County Superior Court Case No. SO C 24763, and *Donald R. Plunkett vs. City of Lakewood*, Los Angeles County Superior Court Case No. SE C 8296, were consolidated for the purpose of trial and tried before the court without a jury, the Honorable Homer H. Bell, Los Angeles County Superior Court Judge presiding, commencing January 6, 1975, and concluding April 3, 1975. In these cases Petitioner sought to enjoin the Respondent City from prosecuting him for violating any law, including the building and zoning codes of the City. In addition, Petitioner sought to enjoin the City from providing water services allegedly in duplication of a water system owned and operated by Petitioner. The Respondent City cross-complained against Petitioner, seeking to enjoin Petitioner from maintaining any multiple family use on the premises owned by him, and described generally as

Lots 1 through 7, 6101, 6107, 6113, 6117, 6123, 6129 and 6133 North Ibbetson, City of Lakewood, County of Los Angeles, State of California. In addition, Respondent City sought a mandatory injunction requiring Petitioner to remove from said premises certain structures built thereon in violation of the zoning and building codes of the City of Lakewood, or, in the alternative, to obtain in some instances building permits or authorizations for said structures after inspection and compliance with the building code. After trial of the matter, and denial of Petitioner's Motion for a New Trial, judgment was entered in favor of Respondent City of Lakewood and against Petitioner on each of said complaints and, in addition, judgment was entered in favor of the Respondent City on its cross-complaint.

At the conclusion of the trial Judge Bell prepared a Written Announcement of Intended Decision (Clerk's Transcript - pp. 948-996). The trial judge pointed out the trial was rendered novel, if not bizarre, by the fact that Plaintiff who brought the action failed to go forward with his case, and that the first witness called by the City was the Plaintiff, Donald R. Plunkett, who when asked whether he owned the property in question refused to answer on the ground that his answer would tend to incriminate him. The trial judge then pointed out that he was laboring under the impression that the plaintiff in good faith would want to prove to the court that his property was in compliance with City ordinances, and suggested that the court, with attorneys and

plaintiff, view the premises. The judge pointed out this was met with an adamant refusal on the part of Petitioner. The trial court then pointed out that the City proceeded to present its evidence through its witnesses, together with documents, diagrams, charts, pictures, and the plaintiff never again resumed the stand. The trial court also pointed out (Clerk's Transcript - pp. 951-952) that Respondent City produced overwhelming amounts of evidence, and it was abundantly clear that the City had explored every avenue of proof available to it, and had competently proved every allegation and violation charged by the City. The court stated that proof of all of the substantive issues was 100% produced by the City, and that plaintiff did not offer any evidence tending to show that as a substantive matter the City's charges were not true. The court stated the entire case of the Petitioner consisted of a massive effort to exclude the City's evidence entirely, or to cast some aspersions upon the evidence which the City produced, or upon the City official who gathered it.

The Second Appellate District of the California Court of Appeal in its unanimous decision by Presiding Justice Kaus, pointed out that the trial court filed two hundred pages of Findings of Fact and Conclusions of Law, resulting in a seventeen page judgment in favor of the City, but that on appeal Petitioner paid no attention whatsoever to the two hundred pages of Findings of Fact and Conclusions of Law. These Findings of Fact, not having been disputed, were accepted by the Appellate Court in the

opinion set forth in Appendix A as its own Statement of Facts.

Therefore, in a case where Petitioner refused to present any evidence, or rebut the evidence presented by the City, and where the Petitioner on appeal has failed to attack the Findings of Fact, the evidence properly received by the court must be accepted as true, and as so found in said Findings of Fact. (*Pennekamp vs. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295)

Petitioner in his statement of the case has failed to correctly and accurately set forth the facts overwhelmingly established in the trial of this case. What he has presented in this Petition is a characterization of facts to fit Petitioner's imagined and manufactured constitutional transgressions by Respondent City. As the Court of Appeal found, these contentions are without merit. Firstly, the evidence before the trial court established that Petitioner was well aware of applicable county and city ordinances, but Petitioner presented no evidence whatsoever that any of the illegal uses of his property were valid nonconforming uses (Page 7 of the Opinion, Appendix A). Secondly, even though Petitioner was twice found guilty in the Municipal Court of violating Respondent's code, he did nothing to correct the violations (Court of Appeal Decision, page 8, Appendix A). Thirdly, there was no evidence that the City was harassing Petitioner and, to the contrary, the City demanded only reasonable compliance with its building and zoning laws (Page 8 of the Appellate Opinion, Appendix A). Lastly,

Petitioner came into court seeking injunctive relief, alleging his structures were valid and nonconforming, and yet refused to allow the court to inspect his premises, or to even testify on his own behalf, or when called under *Evidence Code* §776.

2. Prior to September 25, 1962.

Petitioner owned seven lots in the unincorporated territory of the County of Los Angeles, State of California, subject to the County's building and zoning laws, and on each lot built one single-family residence. Testimony established that Petitioner maintained the aforementioned property in violation of the County building and zoning laws prior to the time it was annexed to the City of Lakewood in 1962, in that there were many violations on said property at the time of said annexation. In addition, the evidence established that prior to said annexation the existence of some of these violations were known to County officials and, in one case in 1962 prior to said annexation, *People vs. Plunkett, Los Cerritos Municipal Court Case No. M 14281*, Petitioner was found guilty of the charge of not providing on said premises garages for the storage of automobiles.

3. November 17 or 18, 1969.

Petitioner's property was annexed to and included within the municipal incorporation limits of the City of Lakewood on November 25, 1962, but said buildings or structures remained more or less unnoticed from

official scrutiny, inspection or investigation, until about November 17 or 18, 1969, when Michael White, a young planning intern of the City of Lakewood, in making an aerial survey of the entire City observed structures and a swimming pool covering the rear of Petitioner's Lots 1 through 7. When Michael White returned to his office he found there were no building permits for these structures, and on November 20, 1969 he and another City official sought permission to enter said premises, and were denied permission by Petitioner. They tried again to enter the premises on November 21, 1969, and again were denied permission. They did not on any occasion enter said premises without permission. Thereafter they applied and received from the Los Cerritos Municipal Court a warrant to inspect the premises pursuant to *California Code of Civil Procedure* §1822.50. At the appointed time Michael White and Lee Renison went to the premises of Petitioner, and requested Petitioner to open gates at the rear of the premises to allow them to inspect the premises. Petitioner, however, refused to allow them to enter the premises, and Petitioner was then cited by a law enforcement officer of the City of Lakewood. Neither Michael White nor Lee Renison, nor any other City official, attempted to or did enter said premises when refused permission by Petitioner. On March 30, 1970 Judge Landis of the Los Cerritos Municipal Court found Petitioner guilty under §1822.57 of the *Code of Civil Procedure* for refusing to allow said inspection, *People vs. Plunkett, Case No. M 37030*, and thereafter suspended Petitioner's sentence, and placed him on summary pro-

bation on condition that he provide entrance to the property to Michael White for the purpose of inspecting the same as to compliance with the City's building and zoning laws. Rather than complying with the condition of probation Petitioner filed suit in the Los Angeles County Superior Court, in the case of *Plunkett vs. the Municipal Court and John C. Landis*, seeking an alternate writ which was never heard, and went off calendar when Petitioner's conviction in case No. M 37030 was reversed by the decision of the Los Angeles County Superior Court Appellate Department in case No. CRA 9491. Petitioner's conviction was reversed on the basis that the inspection warrant originally issued was too broad, and did not limit the inspection to building and zoning violations.

Contrary to Petitioner's erroneous statement, no inspection warrant was ever quashed nor did any court refuse to issue an inspection warrant. All that happened in respect to the matter of the inspection warrant issued by Judge Bigelow in 1969, was simply that it was never executed. Inasmuch as Petitioner Plunkett refused to honor the warrant no one ever went on the property, and Mr. Plunkett's rights were never violated. What did happen was that when Mr. Plunkett was arrested and found guilty of the charge of not honoring the warrant, (which was later set aside on the basis the warrant was defective) no inspection was ever sought or accomplished under such a defective warrant.

4. *People vs. Plunkett*, Case No. M 39760.

Between November 28, 1969 through June 16, 1970 there were negotiations between Judge Landis of the Los Cerritos Municipal Court, Petitioner Plunkett and his then attorney, and the City pertaining to inspection of his premises. These negotiations broke off when the Petitioner filed a suit for an alternate writ in the aforementioned case of *People vs. Municipal Court and John Landis*. Thereafter, on August 18, 1970 Michael White filed a complaint in the Los Cerritos Municipal Court charging Petitioner Plunkett with violation of the City's zoning ordinance by failure to provide the required yards, and maintain single-family residences thereon, in the case of *People vs. Plunkett*, Case No. M 39760.

In the jury trial of *People vs. Plunkett* it was established that Michael White observed the aforementioned property both from the ground and two helicopter flights during the summer of 1970; that the observations from the ground were made from the public streets in front of the property in question, and from the Southern California Edison property to the rear with the permission of the Southern California Edison Company and accompanied by a representative of that company. The constitutional questions raised herein were raised in that trial, and the court ruled against Petitioner. A jury found Petitioner guilty on all counts on February 16, 1971.

5. Plunkett vs. Lakewood.

The aforementioned jury trial involved only a portion of the zoning violations found to exist in the case of *Plunkett vs. Lakewood*. In June of 1971 the City Attorney and Charles Chivetta, the City Director of Zoning and Building, met with Petitioner on his property in the presence of his then attorney, and at the request of the attorney and Petitioner. At that time Mr. Chivetta toured Petitioner's property and noted certain violations and corrections that had to be made in connection with the building and zoning laws. In 1972 Mr. Chivetta caused an aerial survey of the entire City to be photographed and thereafter maintained these photographs in his office to assist persons with building applications, and in preparing planning and zoning matters.

At the trial it was established, and the court found, that the City of Lakewood maintained a helicopter police patrol for law enforcement purposes known as the "Sky Knight", which has received nationwide publicity. Under this program the City owns three helicopters and hires its own pilots to fly the helicopters. The City, which contracts with the Los Angeles County Sheriff's Department for all law enforcement functions, provides observers for the helicopters through the Los Angeles County Sheriff's Department. This helicopter patrol service is also provided by the City of Lakewood by contract to the surrounding cities of Cerritos, Hawaiian Gardens, Artesia, Bellflower, and Paramount. It was established at the

trial that the helicopter is a routine day and night Sheriff patrol that has flown over all parts of the City, including Petitioner's property, at least five hundred times.

There was no evidence in this case that any official of the Respondent City went on or into Petitioner's property without his consent. Petitioner seeks to have this court believe that Respondent officials went into Petitioner's property without the consent or permission of the land occupier. This is not true. It was established that Chivetta and the City Attorney went on and into Petitioner's property, but in the presence and with the permission and consent of Petitioner and his attorney. At that time the parties entered only those buildings or structures that Petitioner agreed to and did open to them. Petitioner, as the owner of said property, was the person to determine whether or not he had the consent of his tenants to do so.

6. Utility Right-of-Way

What Petitioner describes as the "utility right-of-way" is in fact a parcel of land to the west and abutting the rear of Petitioner's seven lots, consisting of a 175 foot wide strip of land owned in fee by the Southern California Edison Company, a public utility, and sometimes called the Edison right-of-way. This strip of land is utilized by the Southern California Edison Company for maintaining towers and electrical transmission lines to transmit high voltage electricity from its power plant at Seal Beach to various portions

of Southern California. The trial court found, and Petitioner has failed to refute this finding, that Petitioner's sole interest in the Southern California Edison Company property is under a license agreement issued by the Southern California Edison Company, revocable at any time on thirty-days' notice by Southern California Edison Company for any reason whatsoever, and that said agreement was never recorded and did not constitute an interest or easement in real property, and merely conferred rights that are almost revocable at will. (Finding of Fact No. 11, Clerk's Transcript Page 999). The trial court also found that Petitioner's rights under the license agreement were nonexclusive, and were subject to the rights of the Edison Company, the trial court finding that Petitioner merely had the right from the license agreement to go on Edison Company property for the purpose of pasturage and beautification of the land (Finding of Fact No. 11, Clerk's Transcript Page 999). The trial court further found that petitioner had no right, title or interest pursuant to said license to maintain thereon any structure, driveway or access. In addition, the trial court found that City officials had gone on to said right-of-way with the permission and in the presence of representatives of the Southern California Edison Company, and had observed the rear of Petitioner's property from said right-of-way, the court finding that this observation was no different than any observation of Petitioner's property that would be made by anyone else, including Edison Company employees, rightfully on said right-of-way.

7. Building and Zoning Violations.

The trial court found that Petitioner, prior to the annexation of his property to the City, and after the annexation of his property to the City, to and including time of trial, maintained on said seven lots an interconnected multiple-family residence in violation of the County and City zoning ordinances restricting each lot to one single-family residence (Finding of Fact No. 19, 20, 36, 42, and 48; Clerk's Transcript, pages 1001, 1002, 1011, 1014-1016, and 1020-1028). In addition the trial court found that commencing in June of 1956 to the present time Petitioner had in many instances requested and obtained from the County, or the City as its successor in interest, a permit to build a structure, usually a garage, but had never completed the structure in accordance with the permit, or requested, as required by the City in its building codes, final inspection. The trial court further found that many of these structures, usually structures for which a garage permit had been obtained, had contrary to the City and County building codes been converted to living quarters, which Petitioner rented for occupancy even though Petitioner had never received or called for a final inspection, or received a Certificate of Occupancy, and that such use and occupancy was void and illegal. (Findings of Fact No. 25-26, 36, 44, 48, Clerk's Transcript pp. 1004, 1010-1012, 1017-1028). In addition, the trial court found that there were many other structures on said lots built maintained and occupied without any building permit or au-

thorization, and that the maintenance of buildings or structures without a building permit or final inspection was a nuisance, which should be abated. (Finding of Fact 47, Clerk's Transcript p. 1020). The trial court also found that Petitioner was at all times well aware of the provisions of the County and City ordinances, and of the necessity of obtaining building permits to construct, maintain or convert structures, and of the necessity of complying with building and zoning laws of both the County of Los Angeles and its successor, the City of Lakewood, and being fully aware of these provisions, and with knowledge thereof, had intentionally, openly and flagrantly violated the terms and provisions of said ordinances and laws. (Finding of Fact 49, Clerk's Transcript p. 1028). In addition, the trial court found that Petitioner has repeatedly since 1961 refused to allow both County and City officials on reasonable request, or pursuant to orders of the Municipal Court on at least five or six occasions, to come onto Petitioner's property to inspect the property at reasonable times for the purpose of determining compliance with the County and City building and zoning ordinances (Finding of Fact 50, Clerk's Transcript p. 1029). The trial court also found there was no evidence that the Respondent City was harassing the Petitioner, and found, in fact that the City had done equity, and sought relief in its cross-complaint in a fair and equitable manner; that in fact all the City sought was reasonable compliance with its building and zoning laws. The trial court found on the other hand that Petitioner had failed and refused to comply with the

County and City zoning and building ordinances, to honor a City inspection warrant issued by the Municipal Court, to honor orders of Judges of the Municipal Court that Petitioner allow the City to inspect the property, and even to allow the trial judge himself to inspect the property, the trial court pointing out that Petitioner in this case has presented no evidence that either the City or County ordinances were arbitrary, oppressive, discriminatory or void, or that he had a valid nonconforming or other right to use his property contrary to said ordinances (Findings of Fact 55-56, 68, 74, Clerk's Transcript pp. 1030, 1035-1036).

8. Judgment of Trial Court.

Judgment of the trial court is summarized on pages 8 and 9 of the Opinion on Appeal set forth in Appendix A. The trial court in issuing said judgment found that the remedy of criminal proceedings instituted by County officials when the property was in unincorporated territory, and instituted by the City after the property was annexed to the City of Lakewood, had proved inadequate, and that the violations continued unabated, necessitating the civil remedy of injunctive process (Finding 81, Clerk's Transcript p. 1038).

9. Other Litigation.

Petitioner makes reference in his statement of the case to other litigation pertaining to the subject mat-

ter of this case in federal court (Petition for Writ of Certiorari, page 11). After Petitioner's conviction by a jury of violating the Lakewood municipal zoning law, in the case of *People vs. Plunkett*, Los Cerritos Judicial District Case No. M 39767, was affirmed by the Appellate Department of the Los Angeles County Superior Court, Petitioner applied for a writ of habeas corpus in the case of *Plunkett vs. Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California*, United States District Court, Central District, Case No. 72-1933-RJK. In that case Petitioner claimed his rights under the Fourth and Fourteenth Amendments had been violated by reason of evidence procured and used in the Municipal Court case, photographing Petitioner's property from police helicopter without an inspection warrant allegedly required by the *Code of Civil Procedure* §§1822.50, *et seq.* By reason of a temporary restraining order issued in that case enforcement of the Municipal Court judgment was restrained until October of 1977, when Judge Robert J. Kelleher on the petition of John K. Van de Kamp, District Attorney of Los Angeles County, and city prosecutor of the City of Lakewood, entered an order denying the petition for habeas corpus and dismissing the same, as well as the restraining order, on the basis of *Stone vs. Powell* (1976) 428 U.S. 465, 49 L.Ed.2d 1067, 98 S.Ct. 3037. Since that date Petitioner has paid the fine imposed to the Los Cerritos Municipal Court, but as of February, 1978, further proceedings were still pending in the Los Cerritos Municipal Court.

In the case of *Donald R. Plunkett vs. John Sanford Todd, et al*, filed on May 23, 1975 in the United States District Court, Central District of California, Petitioner sought damages under the *Civil Rights Act*, 42 U.S.C. 1983. In that suit Petitioner raised the same issues raised in the Municipal Court and in the Superior Court trial, and now raised in his Petition for a Writ of Certiorari. On motion for summary judgment the United States District Court on October 20, 1975, entered its judgment for the defendant Todd, et al on the basis that there were no genuine issues as to any material fact, the plaintiff had no claim against the defendants, or any of them, and further that the court under the doctrine of abstention should not entertain jurisdiction. Plaintiff appealed said judgment to the Ninth Court of Appeals for the Ninth Circuit, No. 75-3729. Briefs have been filed and the matter is awaiting setting for hearing on appeal.

ARGUMENT

1. The untimely filing of the petition deprives this court of jurisdiction over the case.

The Petition for Writ of Certiorari is plainly out of time. The judgment of the Second Appellate District of the Court of Appeal of the State of California was filed on November 15, 1977. *California Rules of Ct. 24(a)* provides that the decision of the Court of Appeal becomes final as to that court thirty days after filing (*6 Witkin, California Procedure (2d), Appeal, p. 4462*). The judgment for which review is sought

became final December 15, 1977. Rehearing was sought and denied. Hearing in the California Supreme Court was also denied, as set forth in Appendix B. Thus pursuant to the command of 28 U.S.C. §2101(c), the Writ of Certiorari had to be sought "within ninety days after the entry of such judgment or decree" — in other words by no later than March 15, 1978. In this case no extension of the filing deadline was sought or obtained from a Justice of this court, and the petition was actually filed in this court on April 18, 1978. Where as here the time for filing a petition is established by an Act of Congress rather than a rule of this court, such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for the court to waive the untimeliness to entertain the petition, and requiring the court to dismiss the petition for want of jurisdiction. (*Walter D. Teague III vs. Regional Commissioner of Customs* [1969] 394 U.S. 977, 22 L.Ed.2d 756, 89 S.Ct. 1457).

This rule has been explained succinctly by Professor Witkin in Volume 6 of *Witkin on California Procedure* (2d) at page 4463, as follows:

"The United States Supreme Court may review a final judgment of a state appellate court, but its test of finality for this purpose is the rendition of a final appellate decision on the issues — usually the date of filing of the opinion. Hence, even though the period for rehearing or hearing in the California Supreme Court has not elapsed, the time runs. But the subsequent granting of a hearing or rehearing in the California Supreme

Court will, of course, destroy the previous finality, and a new period will start when the new final decision is rendered.

"The rule was explained in *Market St. Ry. Co. vs. R. R. Com.* (1945) 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171, an appeal from the California Supreme Court. The opinion states that finality 'is not controlled by the designation applied in state practice', and adds: 'the judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment Such latent powers of state courts over their judgments are too variable and indeterminate to serve as a test of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purpose until it is acted upon or until power to act upon it has expired If rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing.' (65 S.Ct. 773, 89 L.Ed. 1176, 1177)"

2. The decision is obviously correct and involves no conflict of opinion or other basis for review by this court.

Even apart from the untimeliness of the petition, no reason is apparent for review of the decision of the California Court of Appeal. From our corrected

statement of the case it is apparent that the state court has not decided a federal question of substance not heretofore determined by this court, nor has the state court decided it in a way that would not be in accord with the decisions of this court.

The California Court of Appeal, in the opinion for which review is sought, pointed out that on appeal Petitioner paid no attention whatsoever to two hundred pages of Findings of Fact and Conclusions of Law, and by reason of this failure of Petitioner to object to the same the Appellate Court accepted those Findings as the basis of its own statement of facts. The facts as summarized, pages 3 through 9 of the Opinion, Appendix A, are as found by the trial court in its Findings of Fact, and as set forth in Respondent's Statement of Facts, *supra*.

It is well established the facts found by the lower court, and adopted by the highest court of the state, when supported by competent testimony, will not ordinarily be examined by the United States Supreme Court on writ of error (*Portland R. L. P. Co. vs. Railroad Commission*, 229 U.S. 397, 33 S.Ct. 820, 57 L.Ed. 1248; *Whitney vs. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095). Only where Petitioner shows a federal right has been denied as the result of a finding being unsupported by the record or evidence, will the Supreme Court of the United States review findings of fact by a state court (*Fiske vs. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108). Here Petitioner has in his statement of the case

alleged facts which are contrary to the statement of facts of the Appellate Court in the Opinion, and Petitioner has not alleged or shown wherein the findings and determinations of both the trial court and the Appellate Court were unsupported by evidence. Furthermore, as set forth in the Appellate Court decision, Petitioner failed to present any evidence to support his case, and also failed to attack the Findings of Fact and Conclusions of Law arising from the evidence produced by the City. As recently stated in *Time vs. Firestone* (1976) 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154, this Court normally accords findings of the state court deference in reviewing constitutional claims.

3. Respondent's Observations and Photographs of Petitioner's Improved Real Property from Adjoining Public Streets and the Southern California Edison Property were not an Unreasonable Search Under the Fourth Amendment.

The trial court found that when the Petitioner refused to allow city officials to enter his property there was no entry on his property by any city official or agent, nor was there any entry on Petitioner's property by any city official or agent by reason of the inspection warrant issued on November 28, 1969 (Finding of Fact 96, Clerk's Transcript p. 1131); that there was no entry or inspection, or attempt to enter and inspect, any of the land, building or property owned by the Petitioner or rented by the Petitioner, by any city official or agent after they were refused consent to enter therein (Finding of Fact 97, Clerk's Tran-

script p. 1131); that city officials viewed and inspected Petitioner's premises from adjoining public streets, sidewalk and public property, and from the adjoining Edison Company property with the consent of the responsible manager of the Southern California Edison Company (Finding of Fact 98, Clerk's Transcript p. 1131); that Petitioner had a mere license revocable on thirty-days' notice for any cause to use the adjoining Edison Company property for the pasturage of a limited number of animals, and for beautification, and did not have any exclusive right of possession of said property, or the right to exclude agents of the Southern California Edison Company from said property, or agents of the city from entry thereon (Finding of Fact 99, Clerk's Transcript p. 1132). These Findings have not been attacked and were accepted by the court on appeal. Petitioner's statement of facts to the contrary at page 10, page 16, and page 17, must be disregarded. Both the trial court and the Appellate Court in its opinion, Appendix A at page 12, found and determined that there was no coercion on the part of the city in obtaining said consent, and that the observation of Petitioner's property from the Edison property was proper.

The trial court adhered to this court's decision in *Camara vs. Municipal Court* (1967) 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727, and *See vs. City of Seattle* (1967) 387 U.S. 541, 18 L.E.2d 943, 87 S.Ct. 1737, requiring the act of conducting tests or inspection on the premises to be supported by a warrant or consent, but pointed out that that requirement is inapplicable to a

seasonable search. This court in *Air Pollution Variance Board vs. Western Alfalfa* (1974) 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed. 607, pointed out that *Camara* and *See* are inapplicable where there is no invasion of privacy. In the *Western Alfalfa* case the field inspector did not enter the plant or offices, and merely observed the flues and smoke from an open area generally open to the public.

California decisions are in accord with the aforementioned views of this court. The California Supreme Court in *Dillon vs. Superior Court* (1972) 7 Cal.3d 305, 102 Cal.Rptr. 161, held there was no search where marijuana growing in the back yard was visible from the neighbor's second story window. The court there stated the test was whether the person had exhibited a reasonable expectation of privacy and, if so, whether that expectation had been violated by an unreasonable governmental intrusion. In *People vs. Mullins* (1975) 50 Cal. App.3d 61, 123 Cal. Rptr. 201, the court held that where the police had plain view of the contraband from a place in an area to which the occupant had exhibited no expectation of privacy, there was no search in the constitutional sense. The court pointed out that the applicable principle is stated in *Katz vs. United States* (1967) 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. There the court stated that the question in each case becomes a weighing of the factual circumstances of the conduct to determine whether it was

reasonable to expect freedom from the particular observations that occurred.

4. Respondent's Observations and Photographs taken from Helicopter Overflights of Petitioner's Real Property were not a Search.

Again Petitioner, commencing at page 12 of his Application for a Writ of Certiorari, misstates the facts. Firstly, the trial court found and determined that the City of Lakewood had maintained a helicopter police patrol for law enforcement purposes as far back as 1965, which patrol not only patrolled all of the City of Lakewood, but neighboring cities as well, and that city officials had flown over Petitioner's property at least five hundred times. The trial court also found that all that happened in this case was that Michael White on November 17, or 18, 1969, in making a general routine aerial patrol of the city noticed certain structures on Petitioner's property. He then later ordered another flight over Petitioner's property for the express purpose of photographing the same. The court found that there was no evidence that either of these flights were low flying flights, that the flights endangered anyone, or were illegal.

In this case there is no evidence that the city's helicopter patrol flights are illegal, or that Mr. White in his observations on November 17 or 18, 1969, saw anything other than what was in "plain view" of anyone else routinely flying said helicopter. Evidence so procured in such a case is admissible

(*Harris vs. United States* [1968] 390 U.S. 228, 19 L.Ed.2d 1067, 88 S.Ct. 959). The trial court found in Finding 100 at page 1132 of the Clerk's Transcript that city officials had observed the land, building and structures of Petitioner by visually sighting, and in some cases photographing the same, which consists of walls, a swimming pool, and large structures which were conspicuous and in an urban area where the existence of the same would obviously be observed from the air or adjoining rights of way, including the Edison property, and that the existence of the same could not be within any reasonable expectation of privacy.

In *Dean vs. Superior Court* [1973] 35 Cal.App.3d 112, 110 Cal.Rptr. 585, the California court held that such aerial observances without a search warrant were valid. In that case the court pointed out that helicopter flights, and other flights, were regularly made in the area, and therefore there was no reasonable expectation of privacy as to the growing of a three-quarter acre tract of marijuana on said property. In *People vs. Superior Court* [1974] 37 Cal. App.3d 836, 112 Cal.Rptr. 764, police found a stolen vehicle that had been stripped on the streets of Los Angeles. They thereafter called on a helicopter to search the area for the missing parts, and using binoculars parts of the vehicle were observed in the back yard of a residence. The court pointed out that the area was regularly patrolled by police helicopters, and that an article as conspicuous and readily identifiable as an automobile hood placed in the back yard

can hardly be expected to be protected by a reasonable expectation of privacy.

5. Respondent's Inspection of Petitioner's Real Property was not an Unreasonable Search within the Meaning of the Fourth Amendment.

As stated, the only time Respondents were on Petitioner's property was the occasion where the City Attorney and the Planning and Building Director of Respondent went onto Petitioner's property at the request of Petitioner and his attorney, and in their presence. Inasmuch as Petitioner was the owner of the property Respondents were reasonable in assuming they had his consent, and there was not established at the trial any evidence to the contrary. Although Petitioner seeks to imply in his statement of the case that properties were entered without the permission of tenants, there was in fact no such evidence of any such entry, and that portion of Petitioner's statement of the case is incorrect. The trial court found that the the view of said premises by said City officials, while in and on the buildings and land of Petitioner on that occasion, was in the presence of and with the permission of Petitioner and his attorney (Finding of Fact 101, Clerk's Transcript p. 1132).

Petitioner continues to ignore the facts. The facts, as established by the trial court, and not refuted by Petitioner, were that in many instances the buildings or structures were built pursuant to the Petitioner procuring a permit application to do so, and before the same could be occupied it was necessary that the

City inspect the same and give final approval. Certainly Petitioner cannot contend that such structures are protected under a reasonable expectation of privacy. As stated by this court in *See vs. Seattle, supra*, 387 U.S. at page 545, and 87 S.Ct. at page 1741:

"We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspection prior to operating a business or marketing a product."

6. Respondent has not Deprived Petitioner of Property Without Due Process of Law, or Denied Petitioner the Equal Protection of the Laws.

The Appellate Court in its Opinion at pages 13-14, Appendix A, pointed out that even assuming that Petitioner's offered evidence would have shown that Respondent City never had brought a civil action to require a person to get a final permit without first notifying these persons by mail, the same would make no difference in this case. In the first place it was the Petitioner who brought this action — not the City. Therefore Petitioner's accusation that the City has discriminated against Petitioner by bringing the action is totally without foundation. Certainly Petitioner cannot contend that he may bring innumerable suits against the City, as the record so shows, and yet bar the City from seeking any affirmative relief as to Petitioner on the basis that the City has not

taken similar action as to other people. Furthermore, as pointed out by the Appellate Court, all that the City was seeking by its cross-complaint was compliance, including the requirement that Petitioner now obtain the final inspection and the final permits, the same that would be applicable to anyone else in the City. If Petitioner was correct in his position, it would be Petitioner that would be receiving an advantage no one else in the City is afforded — use and occupancy of buildings without final inspection and permit. Petitioner has not alleged or shown that anyone else is given such a discriminatory privilege.

Petitioner seems to imply that the City is prosecuting him for improper motives. As a matter of fact the record is just the opposite, the court having found that it was the Petitioner who came into court with unclean hands and did all sorts of things to prevent the City from observing his violations, and had shown an arrogant defiance of all lawfully constituted authority insofar as his property was concerned (Clerk's Transcript, p. 964). The court also found in Findings 69 through 74 that the City had not wrongfully or unlawfully entered upon a course of conduct threatening to do anything constituting the invasion or infringement or interference with Petitioner's property right, or his lawful use of his property (Clerk's Transcript, pp. 1035-1037).

Furthermore, the testimony was that the notification procedures, of which Petitioner now complains, actually were commenced a year and a half before

the trial of this case (1975), and the procedure was not in existence when this suit was filed, or prior thereto (Reporter's Transcript, pp. 1502-1503).

7. Petitioner was not Deprived of Due Process of Law, or Denied the Equal Protection of the Laws by Exclusion of Evidence Under California Evidence Code §352.

Commencing at page 18, Petitioner alleges the trial court improperly excluded evidence "relevant to the assertion that the totality of the City's official actions against Petitioner was discriminatory enforcement". He does not state, however, his reference.

This issue is set forth at page 13 of the Court of Appeal Decision, Appendix A. After Chivetta had testified that within the last year and a half prior to trial, where practical the Clerk sent out notices to property owners where their permits were "not finalized", Petitioner's attorney attempted to ask whether any suits had been brought to force persons to get these permits. The trial court on an objection being made excluded the evidence under §352 of the *Evidence Code*, on the basis that its relevancy is very tenuous. *California Evidence Code* §352 specifies that the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. As pointed out by the Court

of Appeal, the relevance of this evidence was very tenuous inasmuch as the notification procedure had been commenced after this suit was filed. Furthermore, the City's type of relief had the same effect.

Petitioner's citation of cases, commencing at page 19 through page 20, are totally misplaced. At page 21 Petitioner cites *Snowden vs. Hughes* (1944) 321 U.S. 1, which states the general rule that the unequal or discriminatory enforcement of a law may, where shown to be intentional, be a violation of the equal protection of the laws clause. Here there has been no such showing by Petitioner or anyone. Neither this case nor the *Wick Wo case*, cited by Petitioner, hold that the equal protection clause is violated because one person is prosecuted and not another. There is no evidence here that the City purposely and intentionally singled out Petitioner Plunkett for disparate treatment on an invidiously discriminatory basis. Rather the exact opposite exists here in that it was Petitioner Plunkett who filed this action, claiming his structures complied with the zoning ordinances. Certainly he could not have proven that cause of action by establishing discriminatory enforcement since the result would in effect grant him a special privilege not afforded other properties in the vicinity and zone. The California courts have held that no vested right to violate a city zoning ordinance may be acquired by continual violation, even though the city has for many years failed to enforce the ordinance (*Donovan vs. City of Santa Monica* [1948] 88 Cal.App.2d 386, 199 P.2d 51).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

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